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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

MELINDA ABBT \* 4:19-CV-1353  
VS. \* Houston, Texas  
\* 3:40 p.m.  
THE CITY OF HOUSTON, et al \* May 15, 2019

INITIAL CONFERENCE

BEFORE THE HONORABLE LYNN N. HUGHES  
UNITED STATES DISTRICT JUDGE

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1 MS. SULLIVAN: Deidra Sullivan with the  
2 City.

3 MR. SOLIZ: Joseph Solis representing  
4 Mr. Barrientes.

03:40:46

5 THE COURT: Sit, please. Do I understand  
6 that Abbt's husband, is it chief.

7 MS. WARSHAUER: Yes, sir, I believe so.

8 MS. SULLIVAN: District chief.

03:41:14

9 THE COURT: Did he join in the  
10 discrimination?

11 MS. WARSHAUER: No, sir. He did not know  
12 about it until he was told by Mr. Elliot, who was a former  
13 chief.

03:41:29

14 THE COURT: I thought that was the one  
15 incident with the pictures.

16 MS. WARSHAUER: Yes, sir.

17 THE COURT: There's all this other stuff.

03:41:40

18 MS. WARSHAUER: Oh, I understand. I  
19 understand your question. No, sir. He was not involved  
20 in the investigation once Ms. Abbt reported it, and so, he  
21 was not involved in any further discrimination alleged in  
22 this case.

23 THE COURT: What is the plaintiff doing now?

03:41:52

24 MS. WARSHAUER: She is working for the --  
25 her family business from home. They have training for

1 firefighters, and she's doing the communications and  
2 billings, things like that for staffing.

03:42:22

3 THE COURT: Is it says in here about going  
4 through the city process. Is the function equivalent of  
5 civil service.

6 MS. SULLIVAN: Correct. With fitness for  
7 duty.

03:42:42

8 THE COURT: And then when she was told the  
9 complaint -- the Office of Inspector General, is that  
10 real?

11 MS. SULLIVAN: Yes.

12 THE COURT: Sometimes there's a slot to put  
13 the complaint in, and it goes immediately down to the  
14 basement into the trash can.

03:42:53

15 MS. SULLIVAN: No. This is the real  
16 position within the legal department.

17 THE COURT: And was that ever acted on?

03:43:06

18 MS. WARSHAUER: Your Honor, there was an  
19 investigation, though part of our complaint here is that  
20 we think the investigation was incomplete.

21 THE COURT: Of course you do, because you  
22 want it to come out your way.

23 MS. WARSHAUER: But there was an  
24 investigation.

03:43:13

25 THE COURT: And did she appeal it?

1 MS. WARSHAUER: The investigation did  
2 sustain her allegations against the three people that  
3 Mr. Barrientes, Mr. Elliot and Mr. Sortino, and there was  
4 no appeal or anything after the investigation.

03:43:33

5 THE COURT: So what was the appeal?

6 MS. WARSHAUER: Pardon?

7 THE COURT: You said that what the Inspector  
8 General did was not adequate.

03:43:44

9 MS. WARSHAUER: Oh, I understand. The first  
10 thing was that they did not ask any of the three  
11 individuals who else may have seen the videos. And her  
12 major concern was that the pictures and videos would have  
13 been sent throughout the Fire Department over the years.

14 So that was one of the issues.

03:44:01

15 The second issue was then with the actions  
16 taken in response for both -- Chief Elliot had retired at  
17 this point, but for Mr. Barrientes and Mr. Sortino, the  
18 consequences were not adequate. For example, for  
19 Mr. Barrientes, although they did promote him, he's still  
20 eligible to take a test to become a -- I believe district  
21 chief.

03:44:24

22 THE COURT: This is talking about personnel  
23 policies. It's not a vengeance.

24 MS. WARSHAUER: Yes, sir.

03:44:37

25 THE COURT: They're not -- never worked for

1 millions of dollars or anything. It's to find out what's  
2 going on in the city, and if there are adjustments that  
3 need to be made, the violations of the law are caught,  
4 they have to address them. She's not entitled to  
5 everything she'd like to have happen.

03:44:54

6 MS. WARSHAUER: Yes, sir. Understood. The  
7 main issue, I think, was that the consequences, and then  
8 afterwards, it was something like this where you would  
9 have a sexual harassment issue, one solution might be to  
10 separate the person, the harasser from the victim, and  
11 here that did not happen.

03:45:11

12 THE COURT: But there was no untoward  
13 advances of her, to her.

14 MS. WARSHAUER: Well, she still, because  
15 these people had viewed her pictures --

03:45:27

16 THE COURT: Ma'am, answer my questions, not  
17 the one that's even better.

18 MS. WARSHAUER: Understood. No, there were  
19 no in-person advances.

03:45:43

20 THE COURT: And what role is Elliot's having  
21 personal stuff on the company computer?

22 MS. WARSHAUER: Ms. Abbt.

23 THE COURT: Abbt.

24 MS. WARSHAUER: Her -- those pictures were  
25 on her personal computer.

03:46:03

1 THE COURT: Where was it?

2 MS. WARSHAUER: It was -- she would bring it  
3 to the station on her downtime, and someone -- one of her  
4 co-workers broke into that computer and then uploaded the  
5 pictures onto it.

03:46:15

6 THE COURT: How did she know that?

7 MS. WARSHAUER: She did not know that until  
8 she was told later.

9 THE COURT: Then she doesn't know anybody  
10 broke into it.

03:46:23

11 MS. WARSHAUER: Well, she was not the person  
12 who put it on the station computer.

13 THE COURT: I know that. But broke into, as  
14 opposed to opened and transferred, are different  
15 propositions.

03:46:35

16 MS. WARSHAUER: Your Honor, I think our  
17 position would be that in this situation they were just  
18 saying she did not give anyone to access her computer.

19 THE COURT: I know that, or I assume that.

03:46:47

20 MS. WARSHAUER: Right. Right.

21 THE COURT: I'm comfortable assuming that.  
22 But we don't know that, so we'll have to delve into that.  
23 We don't know how Barrientes -- I'm not saying he did  
24 it -- but Barrientes got into the computer. We simply  
25 don't know.

03:47:15

1 MS. WARSHAUER: Yes, sir.

2 THE COURT: And what was Abbt's job with the  
3 Fire Department?

03:47:33

4 MS. WARSHAUER: She was promoted to chief at  
5 the very end of her tenure.

6 MS. SULLIVAN: Captain.

7 MS. WARSHAUER: I'm so sorry.

8 THE COURT: Captain. Captain is better than  
9 a chief.

03:47:41

10 MS. SULLIVAN: It's two ranks below chief.

11 MS. WARSHAUER: At the time she was an  
12 engineer operator, which was one level above firefighter,  
13 I believe.

03:47:54

14 MS. SULLIVAN: Yes. Chauffeurs,  
15 firefighter, engineer operator, captain.

16 THE COURT: When you say "chauffeur," do you  
17 mean like my chauffeur who picks me up in a limousine, or  
18 do you mean someone who drove a fire truck?

03:48:10

19 MS. SULLIVAN: Somebody who drove the fire  
20 truck. That was the other way of referring to it.

21 THE COURT: I don't mind. That's probably a  
22 really old Fire Department. Fire Department everywhere  
23 practicing. The taxi commission in Boston is the Boston  
24 hack and livery commission. They changed the meat to  
03:48:37 25 transportation and everything. I like that. It's



1 completely meaningless.

2 Were you on *Law Review*?

3 MS. WARSHAUER: No, sir.

4 THE COURT: I thought you were. Search for

03:49:14

5 found copy, viewed, shared. Throw in a few more.

6 Wouldn't you take care of it?

7 MS. WARSHAUER: They can search for it in

8 Google.

9 THE COURT: They can't do it if they don't

03:49:31

10 search for it.

11 MS. WARSHAUER: That is a fair point, Your

12 Honor.

13 THE COURT: Unless she leaves it up.

14 MS. WARSHAUER: Your Honor, that is a good

03:49:36

15 point.

16 THE COURT: Well, I think -- I don't know

17 this, but do we have another incident of the Fire

18 Department employee having his files shared?

19 MS. SULLIVAN: Not to my knowledge. And

03:49:56

20 I've had to go through those recently with the Fire

21 Department the last four or five years. I'm not aware of

22 any other instances.

23 THE COURT: I guess most male firefighters

24 wouldn't put their pictures on the computer that had them

03:50:17

25 on there. They just put women's pictures on the computer.

1 But I could be wrong about that. People do strange  
2 things.

3 MS. SULLIVAN: Agreed.

03:50:45

4 THE COURT: How long the time from this  
5 incident to when she retired?

6 MS. SULLIVAN: When she retired?

7 THE COURT: Just roughly.

03:51:00

8 MS. SULLIVAN: She found out about the  
9 incident in May of 2017, and she was medically separated  
10 from the city in February of this year.

11 So she was off on leave for more than a  
12 year. Almost two.

13 THE COURT: And what was the medical  
14 condition?

03:51:18

15 MS. SULLIVAN: With our process under the  
16 Texas local government code, we had her doctor complete a  
17 medical questionnaire, and the doctor indicated that she  
18 was not able to perform her duties as -- of a firefighter.  
19 It went before the commission, and there was some question  
20 about what was indicated in the report, so we sent her to  
21 an appointed doctor. The appointed doctor also said she  
22 was not fit to perform the duties.

03:51:36

23 THE COURT: Did they give you a hint why?  
24 Some doctors says jurors are not able to serve. That's  
25 not enough.

03:51:53

1 MS. SULLIVAN: I know. It was PTSD, I  
2 believe, is what the diagnosis is.

3 THE COURT: How long ago?

4 MS. SULLIVAN: I'm sorry?

03:52:01

5 THE COURT: Was she ever one of the people  
6 who gets to run in to the burning buildings?

03:52:16

7 MS. SULLIVAN: As a captain, she would have  
8 been responsible for maintaining the scene, but I believe  
9 her promotion occurred while she was out on leave. So as  
10 an engineer operator, she would have been responsible  
11 outside with the truck in operating the pumps and all of  
12 the other equipment associated with it.

03:52:33

13 I believe her chief complaint was that  
14 because she believes her video and pictures were viewed by  
15 other firefighters, that she could not work with other  
16 Houston firefighters.

03:53:00

17 THE COURT: Then that might be reasonable,  
18 personal assumption for her, doesn't mind everybody else  
19 that may be impossible for her to work. And so, was she  
20 paid during the time she was off?

21 MS. SULLIVAN: So --

22 THE COURT: I wasn't sure where the  
23 unpayment went.

03:53:11

24 MS. SULLIVAN: So in terms of if you're out  
25 sick, or for any reason, you can use your vacation, you

1 can use your sick leave. Once that's exhausted, you go on  
2 unpaid leave like anybody else. There is a provision for  
3 donated leave, but it's for your own serious health  
4 conditions, and I'm not aware of at this time she's ever  
5 requested donated leave.

03:53:28

6 THE COURT: But that means her friends and  
7 co-workers have to send it to her.

8 MS. SULLIVAN: Correct.

9 THE COURT: Every once in a while around  
10 here we have that. Someone gives away all their time, and  
11 then all of a sudden they need it.

03:53:37

12 MS. SULLIVAN: But I believe, also, she was  
13 eventually granted workers' compensation. Initially, when  
14 she filed for workers' compensation, our third-party  
15 administrator challenged it, in terms of timing, that she  
16 didn't file the Workers' Comp claim in time. But after a  
17 number of appeals -- and I want to say it was late last  
18 year -- they did grant her Workers' Comp. So they would  
19 have gone back and adjusted her time to code it as

03:53:53

20 Workers' Comp and any pay associated with that. I don't  
21 have those records with me right now that I looked.

03:54:15

22 THE COURT: There's no short-term disability  
23 coverage?

24 MS. SULLIVAN: None.

25 THE COURT: I'm not proposing that.

03:54:28

1 MS. SULLIVAN: I am but -- no, there is no  
2 short-term disability. Having had to take unpaid leave  
3 for two maternity leaves, there's no -- the city doesn't  
4 go beyond that.

03:54:56

5 THE COURT: Again, when did she retire?

6 MS. SULLIVAN: February 2019 is when the  
7 commission medically separated her, but she had not  
8 returned to work since May of 2017.

03:55:16

9 MS. WARSHAUER: And just to clarify that, I  
10 believe she was calling in on a weekly basis.

11 THE COURT: You have to.

12 MS. SULLIVAN: Right. I just wanted to make  
13 sure.

03:55:31

14 THE COURT: In case you die, they'd like to  
15 know. It's a different world. Unless she's really old,  
16 fake sign that says: Management request that employees  
17 who die fall down because we're having a hard time  
18 distinguishing them from the other workers.

03:56:14

19 The OIG, tell us what appropriate action  
20 was in the findings?

21 MS. SULLIVAN: Well, the OIG would not have  
22 any authority to issue any discipline. That would be  
23 strictly the fire chief. If they make --

03:56:34

24 THE COURT: The quote here is they knew  
25 about the video and failed to take appropriate action.

1 Have to define what appropriate action was in their  
2 judgment to know that what he did do was.

03:56:51

3 MS. SULLIVAN: The Office of Inspector  
4 General is run by an attorney. And so, to the extent that  
5 any recommendation was made to the fire chief, it would be  
6 an attorney-client protected communication. But my  
7 understanding is --

03:57:10

8 THE COURT: Not to them. I mean, he's the  
9 Inspector General. You can't create attorney-client  
10 privilege by putting a person who is a lawyer on the job.  
11 The old Prime Pipeline Company, that case involved the  
12 billings and past receipts for oil and gas transported  
13 from one well or the other. And they asserted  
14 attorney-client privilege because the person who handled  
15 that was a lawyer.

03:57:38

03:58:06

16 It's like a receipt from a store or  
17 something, a receipt. And they said -- I found out with  
18 some sweet, gentle questioning, that everybody in contract  
19 administration was a lawyer. So the entire operation of  
20 the business.

03:58:27

21 So I held that they had no. Not just  
22 there, but Prime, whatever it was, Pipeline, took from  
23 their general counsel was executive vice-president and  
24 general counsel. That's two and a halves to maintain a  
25 privilege. And then they went bankrupt. I don't know

1 that they're connected, but...

03:58:52

2 MS. SULLIVAN: The OIG particular findings,  
3 in terms of the investigation were public because they  
4 were provided in correspondence to Ms. Abbt. And the fire  
5 chief which has the sole authority to discipline, demoted  
6 Senior Captain Barrientes two ranks to be rank of engineer  
7 operator. He appealed. It was sustained. The arbitrator  
8 sustained the appeal. And so, he cannot promote to  
9 district chief. He has to start over. So if he wants to  
10 go back in a supervisory role, he has to take the test,  
11 get on a list.

03:59:11

12 THE COURT: This thing about one employee  
13 telling her she should go back to work and be proud of her  
14 body. I don't think that's an official statement.

03:59:39

15 Certainly not harassing. Something -- she must have  
16 brought up, or one of these people sent something out to  
17 everybody. That's not right, talking to each other. And  
18 that person is unidentified.

04:00:05

19 MS. WARSHAUER: Yes, Your Honor. I believe  
20 that was Laura Hunter, who was part of staff services, and  
21 that was one of the people she was told to go talk to  
22 about the incident shortly after she found out about it.  
23 That was the context.

04:00:20

24 MS. SULLIVAN: Laura Hunter is in member  
25 services. She's not in staff --

1 THE COURT: Member services?

2 MS. SULLIVAN: Yes. Staff services is the  
3 investigative body for HFD, member services is whatever.

04:00:34

4 THE COURT: It would help if they give it a  
5 name.

6 MS. SULLIVAN: I think it's called member  
7 services, but don't quote me on that because it changes  
8 each chief.

04:00:45

9 THE COURT: That the investigator went to  
10 the wrong station means nothing. His GPS must have been  
11 down. So there's no need for the guy to ask for  
12 Barrientes -- what's the name?

13 MS. WARSHAUER: Sortino.

04:01:24

14 THE COURT: Is that what it is, in Italian  
15 or South Texas English.

16 MS. WARSHAUER: I'm not sure.

17 THE COURT: That's a good rule. They call  
18 themselves that.

04:01:46

19 So if the investigator didn't ask, your  
20 client already knew because other people were telling him  
21 they were on --

22 MS. WARSHAUER: She knew from one person.  
23 And, if anything --

04:02:03

24 THE COURT: The fact in the case is, she  
25 knew, so it doesn't matter how many people he asked were



1 they on there.

2 MS. WARSHAUER: Was it on the computer?

3 THE COURT: Yes.

4 MS. WARSHAUER: Yes, Your Honor, that's

04:02:13

5 correct.

6 THE COURT: Was it lose on the computer?

7 Sortino?

8 MS. WARSHAUER: Yes, Your Honor.

9 THE COURT: If he wants to use his vacation

04:02:52

10 time to do the suspension, what's wrong with that? Those  
11 are real days that are free time.

12 MS. WARSHAUER: Your Honor, it's our  
13 understanding that the Fire Department can choose whether  
14 or not to allow that. And so, that was --

04:03:09

15 THE COURT: They allowed it, but -- how  
16 long, again, did she work after the incident?

17 MS. SULLIVAN: She never returned to work  
18 once she -- you mean after which incident?

19 MR. SOLIZ: After she found out about it?

04:03:40

20 She found out about it like years later. The incident  
21 occurred, and it was years later before she found out  
22 about it.

23 THE COURT: I thought she went home when she  
24 found out about it.

04:03:51

25 MS. SULLIVAN: As soon as she found out, she

1 reported off-duty in May of 2017, and he never saw her  
2 again, in terms of working.

04:04:06

3 THE COURT: Paragraph 21 is about schedules  
4 were the malefactors were with her, but not applied. She  
5 never was there.

04:04:19

6 MS. WARSHAUER: Your Honor, part of the  
7 reason, at least our position that part of the reason she  
8 did not come back was that there was not -- I mean, she  
9 asked for some sort of desk job or something she could do  
10 where she wouldn't need to interact with Mr. Barrientes,  
11 Chief Elliot when he was there and others who saw the  
12 video, and that there were no jobs for-- she was told  
13 there was nothing she could do in that kind of capacity.

04:04:35

14 THE COURT: When did she do that, after she  
15 went home sick that day?

16 MS. WARSHAUER: Yes, Your Honor. It was an  
17 ongoing conversation, and she was requesting meetings with  
18 the chief.

04:04:49

19 THE COURT: So that's got to be actually  
20 wrong, but there were no schedule, or if she's not there,  
21 she's not scheduled. So it couldn't be conflict with  
22 these clowns -- I mean people.

04:05:07

23 MS. WARSHAUER: Your Honor, she, while on  
24 leave was trying to meet with people within HFD to see if  
25 there was something she could do to come back to not do

1 work that would not overlap with them, and she was told  
2 that would not be possible.

3 So that's what we meant by that paragraph.

04:05:21

4 THE COURT: That would be one line. She  
5 wanted nonconflicting schedules and essentially said that  
6 was too complicated.

7 MS. WARSHAUER: Yes, Your Honor.

8 MS. SULLIVAN: And if I may be exact, my  
9 understanding is she asked to be able to work from home.

04:05:36

10 THE COURT: Hard for a firefighter.

11 MS. SULLIVAN: That's correct.

12 THE COURT: That was a bad joke. I burn my  
13 house down, I get time for that one.

04:05:47

14 MS. SULLIVAN: The second request is that to  
15 the extent she took a staff position, we would have to  
16 backfill her position, meaning we would pay overtime for  
17 somebody to serve in her role and pay her salary because  
18 we have minimum staffing requirements on our fire trucks.  
19 And we -- the staff positions that we have were already  
20 filled at that time.

04:06:07

21 So the only people that are able to work  
22 on staff is those who are injured on duty.

23 THE COURT: As a firefighter?

24 MS. SULLIVAN: As of -- as -- any

04:06:18

25 firefighter out at -- at the station. And there is a

1 medical process that we have to go through, in terms of  
2 accommodating and providing transitional duty, and at that  
3 time she wasn't eligible.

4 And the other thing is we have several  
04:06:37 5 fire stations and several -- we have four shifts. So the  
6 likelihood that she would cross paths with Barrientes or  
7 Sortino or any of the other ones, there's the north side,  
8 there's the south side, and they usually stay within their  
9 quadrant.

04:06:57 10 MS. WARSHAUER: And, Your Honor, that goes  
11 to --

12 THE COURT: Does that partially determined  
13 on how many fires you have someplace? There are times you  
14 use the alarm that --

04:07:05 15 MS. SULLIVAN: Five alarm? So it typically  
16 would come from, a district will have, let's say, four or  
17 five stations, and if that alarm is in that district, they  
18 would all come from that same --

19 THE COURT: If it still keeps going, they  
04:07:20 20 call somebody from another.

21 MS. SULLIVAN: The nearest, the closest.  
22 But Houston is large enough. There's west Houston,  
23 there's south.

24 THE COURT: So how do we know that the City  
04:07:41 25 of Houston punished her for the complaint?

1 MS. WARSHAUER: A few reasons. The first  
2 one, it's our position that there would have been an  
3 option for some sort of paid leave.

4 THE COURT: Okay.

04:07:54

5 MS. WARSHAUER: So that's one. And I think  
6 the main one, and that denial came after she made her  
7 complaint.

04:08:24

8 THE COURT: My point is, how do you know  
9 Houston had the idea we're going to punish this woman, as  
10 opposed to bad rules and processes when they got an  
11 unusual or an unfillable request? You can't -- but what  
12 you have is a problem that the city took an adverse job  
13 action. Is that necessary? And that it was after a  
14 complaint is a necessary condition. But they're not  
15 sufficient. You still have to prove that it's connected.  
16 Otherwise, it would post hoc ergo propter hoc.

04:09:02

17 I take Workers' Comp case, staff files for  
18 Workers' Comp, down the road he gets laid off or  
19 something, and he'll get a lawyer and sue the company for  
20 compensation discrimination. You're not immune from  
21 layoffs because you had a comp claim, you're immune to a  
22 principle layoff, where there's some evidence that female  
23 and most lawyers, would agree with that?

04:09:33

24 MS. SULLIVAN: I'm sorry?

04:09:53

25 THE COURT: Is that Workers' Comp

1 retaliation? They give you this popular economic argument  
2 that keeps their rates down. The bigger problem is it  
3 keeps the morale of the entire workforce vague. The  
4 company is perfectly willing to pay for compensation for  
5 people who really are hurt on the job and all that sort of  
6 thing. And, yes, their rates may reflect the number of  
7 injuries, but that's not the workers' fault in most cases.  
8 If you run a sloppy operation, more people are going to  
9 get hurt.

04:10:16  
10 MS. SULLIVAN: Your Honor, if I may? We  
11 attempted to hold an interactive meeting to determine if  
12 there was some way that we could accommodate her. She did  
13 not attend that meeting. The second issue when we were  
14 trying to schedule the interactive meeting, the medical  
04:10:58 15 questionnaire completed by the appointed doctor, she never  
16 signed the release so that the department could see it in  
17 order to be able to figure out what, if anything, they  
18 could do for her.

19 THE COURT: She sent a city form to her  
04:11:13 20 doctor.

21 MS. SULLIVAN: Commission. The commission.

22 THE COURT: The commission.

23 MS. SULLIVAN: Yes.

24 THE COURT: And they had to get a release to  
04:11:25 25 see something that was sent by her for your benefit?

1 MS. WARSHAUER: And she was eventually told  
2 that they did have the correct release. So, as far as she  
3 was aware, that they had everything they needed. So,  
4 there may have been miscommunications, but I just wanted  
5 to clarify that.

04:11:43

6 THE COURT: Could it be that this is not an  
7 employment discrimination at all? It was simply the use  
8 of her personal stuff? What do you call it when somebody  
9 releases old love letters from somebody, they don't like  
10 what they're doing, for whatever reason, now it's just  
11 everybody's nosy. It's an invasion of privacy, but when  
12 they did it, they didn't know what was there. I mean, if  
13 they really opened up and hacked her computer, they don't  
14 know what they're going to get.

04:12:59

15 MS. WARSHAUER: Your Honor, I think the key  
16 here was two of the people that we know saw the video and  
17 then did nothing about it except continued to watch it and  
18 send it to each other, were two of her supervisors.  
19 And --

04:13:25

20 THE COURT: That still doesn't change the  
21 nature of everybody who did that -- I haven't briefed read  
22 this, so-to-speak, but that's what happens, that he breaks  
23 into somebody's office and gets this girl that's otherwise  
24 interested in letters, and takes them out and spreads them  
25 out, not everybody reads them, but purloining letters

04:13:39

04:14:04

1 does.

2 MR. SOLIZ: If I could mention something?  
3 It's Mr. Barientos' position that he never touched the  
4 computer. A video was e-mailed to him from some unknown  
04:14:27 5 source, and saw the video. Later, he mentioned it to his  
6 supervisor, which is Mr. Elliot, and then he asked to see  
7 the video, and it shows the picture of the video.

8 He didn't break into the computer. It was  
9 just the one video. There's references to other pictures,  
04:14:52 10 but he claims he's never seen those pictures.

11 THE COURT: Republication --

12 MR. SOLIZ: But it was his supervisor. His  
13 supervisor asked him. He reported the video.

14 THE COURT: Did he make a written report?

04:15:15 15 MR. SOLIZ: Not that I know of.

16 THE COURT: Did the supervisor --

17 MS. WARSHAUER: No.

18 THE COURT: -- take notes and talk to  
19 somebody forward or sideways?

04:15:26 20 MS. SULLIVAN: As far as I'm concerned, it  
21 didn't have anything to do with work.

22 THE COURT: Well, it's clear. This is  
23 not -- her contents was not work-related. But if you find  
24 out somebody on your staff is, she starts stealing law  
04:15:48 25 clerks' down the hall briefs and changing the names, I



1 have a problem with that. So it's something that an  
2 employer would want to know.

04:16:06

3 MS. WARSHAUER: And, Your Honor, to answer  
4 your question, no, there was never any written report or  
5 anything like that. And as far as we know from  
6 pre-discovery, the city did not have any sort of process  
7 in place even to forward these kinds of reports, is what  
8 we were told by Mr. Barrientes during his pre-suit  
9 deposition.

04:16:24

10 MS. SULLIVAN: What kind of process to do  
11 what?

12 MS. WARSHAUER: To report sexual harassment,  
13 for example, and sexual harassment training.

04:16:33

14 THE COURT: Wait. If it's not -- look,  
15 nobody drew dirty pictures of her and left them on her  
16 desk or something. There are all kinds of gestures which  
17 when taken to be related, but first mid-level managers  
18 should use common sense. There's not a book for that.

04:17:05

19 And they probably ought to report one level up to anything  
20 that may disturb the piece and harmony of whatever  
21 operation it is. But it's not sexual harassment because  
22 nobody was trying to run her off the job because of her  
23 sex. If they are, I, of course, don't want to see them,  
24 but the sex tapes were self-produced. She had them on her

04:17:32

25 computer. It's not about getting her out of the workplace

1 so that friends can have the job or looking at her mail.  
2 They're not for prurient interest, not sexual economic.  
3 The emphasis of the Equal Employment Act is equal  
4 opportunity. And it's become into a semi-fairness based  
04:18:28 5 on jokes somebody takes offense at which or may not  
6 involve men, women, whites, blacks, whatever.

7 And all this sharing, did it go on company  
8 computers?

9 MS. SULLIVAN: The computer that was in the  
04:18:51 10 station was not a City of Houston computer. Someone had  
11 brought their personal computer in and set it up.

12 THE COURT: So the copy, what was on her  
13 computer was not a company computer?

14 MS. WARSHAUER: Wait. To clarify. This was  
04:19:11 15 a computer brought in by another firefighter for use of  
16 all the firefighters at the station. It was not, as far  
17 as we know, purchased by the City of Houston, but it was  
18 used for City of Houston work.

19 THE COURT: And that's the source of the  
04:19:28 20 film?

21 MS. WARSHAUER: No, Your Honor. This was  
22 the computer where we allege Mr. Elliot, Mr. Barrientes  
23 watched the video. This is separate from her own personal  
24 laptop. If that makes sense.

04:19:45 25 MS. SULLIVAN: It somehow got transferred to

1 that computer.

2 THE COURT: She didn't know they transferred  
3 it.

4 MS. WARSHAUER: No, Your Honor.

04:19:49

5 THE COURT: They watched it.

6 MS. WARSHAUER: They watched it. And I  
7 believe Mr. Barrientes alleges that he watched it on his  
8 cellphone.

04:20:00

9 MR. SOLIZ: It was sent to him by someone,  
10 another source, by e-mail. He didn't know who it was  
11 until he opened it. But he viewed it on his cellphone and  
12 showed it to Mr. Elliot who showed it on his cellphone,  
13 not on the computer.

04:20:13

14 MS. WARSHAUER: And it's our position that  
15 it was on this computer captain was stationed, in the  
16 watch office, I believe is what it's called.

17 THE COURT: The original source for the  
18 cellphone video?

04:20:21

19 MS. WARSHAUER: No, sir, not the original.  
20 The original source was her personal laptop.

21 THE COURT: That computer is from her  
22 computer, and then everybody else got it from there?

23 MS. WARSHAUER: Yes, Your Honor.

24 THE COURT: And it branches --

04:20:35

25 MS. WARSHAUER: Yes, Your Honor --

1 THE COURT: -- into infinity?

2 MS. WARSHAUER: Yes, Your Honor.

3 THE COURT: Is the city vicariously liable  
4 for tort committed by its workers that's unrelated to  
5 work?

04:20:54

6 MS. WARSHAUER: Your Honor, we, on Monday,  
7 filed motion for leave to amend the complaint, and that is  
8 one of the changes that we've asked to make, is that for  
9 that tort to just be against Mr. Barrientes and not the  
10 city.

04:21:09

11 THE COURT: How about the rest of them?

12 MS. WARSHAUER: Sorry, Your Honor?

13 THE COURT: By now we know 15, 20 people who  
14 watched it.

04:21:17

15 MS. WARSHAUER: We only know of two, and we  
16 only know that Mr. Barrientes was someone who had the  
17 video and sent it off to someone else. So that was the  
18 only person we thought we could bring that claim.

19 THE COURT: You brought --

04:21:30

20 MS. WARSHAUER: Yes.

21 THE COURT: So it's only, we're at four now.  
22 Only four people that have seen it. It's not like  
23 everybody has seen it.

24 MS. WARSHAUER: It is our belief that  
25 because it was on this computer for ten years, that it's

04:21:45

1 at least highly likely that many other people saw it  
2 and -- but obviously we would need to conduct  
3 additional -- that's part of what we would like to do in  
4 discovery is to try to figure out who actually saw it.

04:22:08

5 THE COURT: That's kind of a problem about  
6 all this stuff. It's in your notes. Is there anything in  
7 this memo?

8 MS. SULLIVAN: No. I was in state court and  
9 I just raised my affirmative defenses.

04:22:53

10 THE COURT: Is this on the computer?

11 MS. SULLIVAN: I like to clean it up  
12 occasionally to match the case.

04:23:15

13 THE COURT: I get cases where the complaint  
14 says: Now comes (plaintiff's name goes here). And goes  
15 on. Or it talks about Mr. Thompson's car wreck for a page  
16 and a half, and then it lapses into completely different  
17 things. They don't even read their own eight-page  
18 complaint.

04:23:32

19 MS. WARSHAUER: Your Honor, I can tell you  
20 read that petition.

21 THE COURT: You could do spell check. You  
22 know what the original name is, just replace it  
23 everywhere.

24 MS. WARSHAUER: Yes, Your Honor.

04:23:52

25 THE COURT: You're right. It's technically

1 correct, but substitute probably would be useful.

2 So what would you like to do in response  
3 to that?

04:24:14

4 MS. SULLIVAN: I'll file my motion for  
5 summary judgment. They were allowed to take pre-suit  
6 discovery in state court. And so, Ms. Abbt has not been  
7 deposed.

8 THE COURT: Do you want to depose her?

9 MS. SULLIVAN: Yes, I do.

04:24:25

10 THE COURT: Is she deposable because of her  
11 health?

04:24:39

12 MS. WARSHAUER: She is deposable, Your  
13 Honor. I would also note that on Monday we also filed  
14 motion for remand, but that will happen in the course of  
15 time.

16 THE COURT: Probably not.

04:24:51

17 MS. WARSHAUER: Understood, Your Honor.  
18 That was under the rule that the, both defendants have to  
19 file some sort of, independently need to file consent, and  
20 that did not happen here, that we're aware of.

21 THE COURT: If when the city removed, he'd  
22 been served?

04:25:09

23 MS. WARSHAUER: Yes, sir, he was. I  
24 contacted Mr. Soliz and confirmed the via e-mail that he  
25 would consent to removal.

1 THE COURT: Well, I'd like it better when  
2 you do for others that did.

3 MS. SULLIVAN: I actually put it in my  
4 notice of removal.

04:25:20

5 MS. WARSHAUER: Yes, Your Honor. And there  
6 are cases in the Southern District and elsewhere that say  
7 that a line, one co-defendant says a removal saying the  
8 other co-defendant consented is not sufficient that  
9 co-defendant needs to file some independent written notice  
10 or consent also.

04:25:39

11 MS. SULLIVAN: I apologize. This is the  
12 original part of the e-mail.

13 THE COURT: You may have an e-mail problem.  
14 They were okay with removal. Court of Appeals Circuit has  
15 said using any word other than "consent" as a word is  
16 inadequate. The gist of it. I don't think not simply by  
17 okay. But I'll look at it. In the meantime, take her  
18 deposition and think about it.

04:26:35

19 I'm not one who normally promotes adding  
20 more tort claims to the thing, but it seems to me that  
21 somebody sent it to Barrientes. That's okay. You can't  
22 control what people do, but to republish it is a problem.  
23 You'd still have the damages problem of making him  
24 responsible for all the damages when for ten years this is  
25 floating around in the back rooms of the Fire Department.

04:27:14

04:27:42

1 Is that what you were going to say?

2 MS. SULLIVAN: No. I was going to say  
3 "allegedly." But saying that she's still promoted, she  
4 still had fine evaluations. There's nothing to reflect  
04:28:03 5 that there was any harm to her employment, or that there  
6 was severe probation, or any other damage.

7 THE COURT: City's position is that if she  
8 was so discommoded by that, it's called a job injury, it's  
9 not employment discrimination.

04:28:22 10 MS. WARSHAUER: I think they would actually  
11 depict her as on-the-job-injury.

12 THE COURT: Because it's not in the course  
13 and scope?

14 MS. SULLIVAN: But that was never argued --

04:28:33 15 THE COURT: That sounds just like her. And  
16 is she still living in Houston?

17 MS. WARSHAUER: She's living outside of  
18 Houston.

19 THE COURT: I mean --

04:28:45 20 MS. WARSHAUER: Yes. In the area,  
21 generally. Yes, sir.

22 THE COURT: Called the charity and they keep  
23 referring to the Greater Houston Metropolitan Area. So  
24 you could say Metropolitan Houston. Most of us do, say  
04:29:02 25 Houston. People in Bellaire don't like. That's tough. I



1 happen to live in a parasite municipality out west. Some  
2 people in my town think Houston grew up next to it. And  
3 there's 4,500 of us, something like that.

4 Any objection to amendment?

04:29:27

5 MS. SULLIVAN: I do because she removed the  
6 Title VII claims and raises the Texas Labor Code, solely  
7 for the purpose of defeating federal jurisdiction.

04:29:43

8 THE COURT: Just can't do that. You can't  
9 plead it one way and when it doesn't go well: Oh, I meant  
10 to call it another title. It describes a federal action.  
11 If you never mention Title VII, "allegedly," the complaint  
12 describes employment discrimination.

13 MS. WARSHAUER: Yes, Your Honor.

14 THE COURT: Or the other things.

04:29:59

15 MS. WARSHAUER: And, Your Honor, in our  
16 motion for leave and the motion for remand, we do cite  
17 cases which I unfortunately don't have with me where  
18 plaintiffs are permitted to choose if they want to bring  
19 it under the Texas Labor Code or the Title VII, and  
20 actually switch them, and cases that were remanded on that  
21 basis.

04:30:14

22 THE COURT: I'm not going to remand it on  
23 that basis. But I'll read it.

24 MS. WARSHAUER: Understood.

04:30:26

25 THE COURT: Take your best couple of cases

1 that's simply advocating responsibility the plaintiffs  
2 have. They plead it one way and say, Oh, no, I mean it.  
3 It's like I get it all the time. It's removed because of  
4 diversity or something they wanted \$75,000, and sometimes  
04:30:49 5 they don't use their number at all. And so, I always ask  
6 the other lawyer: About how much was your last demand?  
7 And he'd say it's under 75. Oh, well, that was just a  
8 demand. How much was it? \$287,000.

9 MS. WARSHAUER: Yes, Your Honor. And we  
04:31:09 10 recognize that the Court does not lose jurisdiction on  
11 this basis. The jurisdiction is determined at the time of  
12 removal, but if the Court were to permit that amendment,  
13 and the Court would have discretion whether to exercise  
14 supplemental jurisdiction at that point because that's  
04:31:25 15 what the motion for remand is based on.

16 THE COURT: It's the standard. Your problem  
17 is not whether it's Texas or federal. Whether it is in  
18 fact sexual discrimination as opposed to invasion of  
19 privacy.

04:31:39 20 MS. WARSHAUER: Yes, Your Honor. And one  
21 main issue is that the tort claim that we do have against  
22 Mr. Barrientes, it is, as far as we know, the first one  
23 brought under the statute. So that is one of the reasons  
24 we think.

04:31:52 25 THE COURT: Which statute?

1 MS. WARSHAUER: It's 98B.002. It was passed  
2 in 2015. It's called, colloquially, the Texas revenge  
3 porn statute. And as far as I could see on Westlaw --

4 THE COURT: Texas what?

04:32:07

5 MS. WARSHAUER: Revenge porn statute. It  
6 was called -- I think it's broader, much broader than that  
7 because we think it applies to this case. It's basically  
8 for cases like this.

04:32:19

9 THE COURT: You would think this is my 40th  
10 year as a judge, 14 years as lawyer, about once a month I  
11 learn of some law I have yet to run across. And this is  
12 one of them.

04:32:37

13 MS. WARSHAUER: Yes, sir. When I looked on  
14 Westlaw on Monday, this was the only case, only document,  
15 that I was citing it. And so, that will be a novel issue  
16 state law which will go into the motion for remand.

17 THE COURT: I can do novel issues too.

18 MS. WARSHAUER: Understood, Your Honor.  
19 Absolutely.

04:32:50

20 THE COURT: How do you apply recoupment, or  
21 would appear with another personal property, on oil and  
22 gas properties in Montana.

04:33:15

23 MS. WARSHAUER: Yes, sir, understood. I  
24 honestly don't we even get to that issue because of the  
25 consent to removal issue. So, as you'll see in the motion

1 that's argument number one, absolutely. And second in the  
2 alternative.

04:33:34

3 THE COURT: But you can give me a lot of  
4 text if you want, but I would like to say stole from brief  
5 if you state your proposition and a couple of citations.

6 MS. WARSHAUER: I think it is fairly  
7 skeletal, but if it's too much, I will certainly --

8 THE COURT: I'm just trying to save  
9 everybody time and money.

04:33:43

10 MS. WARSHAUER: Understood, Your Honor.

11 THE COURT: I think I understand the  
12 problem. I just don't understand the issues.

13 MS. WARSHAUER: Understood. That section, I  
14 think, is like two paragraphs. I tried to keep it short.

04:33:55

15 THE COURT: I started doing that as a  
16 lawyer, knowing how impatient I was, I thought maybe some  
17 people who wear dresses at work, like my colleagues, would  
18 say: You know, Judge Sondock, who was a wonderful judge,  
19 she'd draw a red line across in the middle of Page 2 of  
20 your brief. That's where she stopped reading.

04:34:23

21 If you can't explain it in page and a  
22 half, you don't understand it yourself. As bad as I am, I  
23 thought she was a marvelous colleague. And the years we  
24 were on the bench together in state court, we were the  
25 only civil district judges to take, asked for a jury on

04:34:41

1 Friday. And I did the most, and she did the second most  
2 summary judgments.

3 MS. WARSHAUER: Times have changed.

04:34:59

4 THE COURT: Best thing I did was abolish it  
5 with the help of Don Phillips and Dan Cochran. We had a  
6 52-year old central docket which works real good if you've  
7 got two or three judges. Twenty-five of them, it's just  
8 completely disconnects the judge to whom the case is  
9 assigned from any preparation.

04:35:19

10 So we put together what came to be known  
11 as the January conspiracy. It persuaded majority of the  
12 district judges after I think it was 52 years to abolish  
13 it. Our system here is, you get it. It's yours. No  
14 whining. Success or failure. But you have some hints  
15 that you need to prepare the jury. In the old system I  
16 would get the jury before I'd get the case file.

04:35:32

17 MS. WARSHAUER: Crazy.

18 THE COURT: Sometimes during jury selection  
19 or opening argument, I could read enough to know that  
20 there was a summary judgment motion in there that should  
21 have been granted. And the other lawyer, unless you've  
22 done it a couple of times and it was denied, the saying  
23 was: You never get reversed for summary judgment, denying  
24 a summary judgement. The problem is, I wasn't there to  
25 get a verdict. I was there to do what I thought was

04:35:55

04:36:13

1 right.

2 MS. WARSHAUER: Yes, sir.

3 THE COURT: All right. When do you want her  
4 deadline to get your response?

04:36:26 5 MS. WARSHAUER: Pardon?

6 THE COURT: Your reply, when do you want to  
7 do it, or have you already done it?

8 MS. WARSHAUER: I've already done it, the  
9 motion for remand. And so, I think it's docketed

04:36:38 10 for 21 days from Monday.

11 MS. SULLIVAN: I'd like an opportunity to  
12 file a response.

13 THE COURT: Sure. I'll give you more time.  
14 Take two weeks.

04:36:48 15 MS. SULLIVAN: Okay.

16 THE COURT: Because it's Monday, she'll work  
17 on the weekend. That would cause heart attacks from other  
18 lawyers: Oh, no. We're not going to do that. She'd get  
19 runoff.

04:37:05 20 All right. Can you think of anything she  
21 didn't cover?

22 MS. SULLIVAN: I don't believe so, Your  
23 Honor.

24 THE COURT: Do you have anything to add  
04:37:13 25 about anything?

1 MR. SOLIZ: Not at this time, other than to  
2 clarify. Were you serious about Wednesday, or is that a  
3 joke? The reason I ask is I'm scheduled to be out of town  
4 from the 18th to the 24th. So from Saturday until next  
5 Friday on a visit --

04:37:28

6 THE COURT: The deadline was Friday, right?

7 MS. WARSHAUER: Thursday.

8 MR. SOLIZ: It's June 2nd.

9 MS. WARSHAUER: And I apologize if I wasn't  
10 clear on what I filed.

04:37:48

11 THE COURT: About the 30th, then, under the  
12 rule.

13 MR. SOLIZ: Something like that. End of  
14 June -- I mean, end of May, first of June, but it's not  
15 next week.

04:37:58

16 THE COURT: How about June 6th, the landing  
17 in Normandy? She's put all those strange steel  
18 contraptions that they weld so your boats can't get to the  
19 shore. She put all those in the way. Going to have to  
20 work straight through to the 6th.

04:38:25

21 MR. SOLIZ: That's fine.

22 THE COURT: Anything else?

23 MS. SULLIVAN: No.

24 THE COURT: Okay. Thank you.

04:38:32

25 **(Recessed at 4:38 p.m.)**

**COURT REPORTER'S CERTIFICATE**

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I, Johnny C. Sanchez, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/  
Johnny C. Sanchez, CRR, RMR



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